DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR PART 2800

Rights-Of-Way, Principles and Procedures; Amendment of Procedures for Recovery of Costs

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed Rulemaking.

SUMMARY: This proposed rulemaking would amend the existing cost recovery procedures in 43 CFR 2800 by revising and relocating the existing cost recovery procedures. This change would provide for the recovery of reasonable costs, using the criteria of section 304(b) of the Federal Land Policy and Management Act of 1976, of processing and monitoring right-of-way grants and temporary use permits issued under the authority of title V of the Federal Land Policy and Management Act.

DATE: Comments should be submitted by September 23, 1986. Comments received or postmarked after the above date may be considered as part of the decisionmaking process on issuance of a final rulemaking.

ADDRESS: Comments should be sent to: Director (140), Bureau of Land Management Room 5555, Main Interior Bldg., 1800 C Street, NW., Washington, DC 20240.

Comments will be available for public review in Room 5555 of the above address during regular business hours (7:45 a.m. to 4:15 p.m.), Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Darrell Barnes, (202) 343-5441.

SUPPLEMENTARY INFORMATION: The Bureau of Land Management is authorized by the Mineral Leasing Act, as amended and supplemented (30 U.S.C. 181 et seq.) and the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.) to collect from right-of-way applicants the costs of processing and administering right-of-way grants or temporary use permits. Until recently, the procedures for the recovery of costs under both Acts were consolidated in Part 2800 of Title 43 of the Code of Federal Regulations. Effective February 11, 1985, the recovery of costs under the Mineral Leasing Act were relocated to Part 2800 of Title 43 of the Code of Federal Regulations (50 FR 1308). The Bureau published a proposed rulemaking in the **Federal Register** of January 18, 1983 (48 FR 2110), designed to update the cost recovery regulations and to make more adequate provision for recovery by the United States of the reasonable costs of processing and monitoring rights-of-way granted under the Federal Land Policy and Management Act. After the close of the 60-day comment period, and while the comments were being reviewed, the United States Court of Appeals for the Tenth Circuit in a consolidation appeal of three cost recovery cases held that the Department of the Interior must consider the factors listed in section 304(b) of the Federal Land Policy and Management Act (43 U.S.C. 1734(b)) in establishing costs for processing right-of-way applications under title V of the Federal Land Policy and Management Act (*Nevada Power Company* v. *Watt*, 711 F. 2d 913 (10th Cir. 1983)(*Nevada Power*)). The factors that must be considered are: (1) actual costs (exclusive of management overhead); (2) the monetary value of the rights or privileges sought by the applicant; (3) the efficiency to government processing involved; (4) that portion of the costs incurred for the benefit of the general public interests rather than for the exclusive benefit of the applicant; and (5) the public service provided; and (6) other factors relevant to determining the reasonableness of costs. The Court further held that the existing regulations establishing the procedures for application processing did not provide for this consideration. The Court held, however, that reasonable costs of processing may include the reasonable costs of preparing an environmental impact statement.

The Court ruling further stated that the Department of the Interior could determine and assess the reasonable costs of processing an individual right-of-way application either by rulemaking or by case adjudication. After studying the decision and the possible alternatives, the Department has decided to develop regulations which provide procedures and criteria for assessing reasonable costs on a case-by-case basis. In arriving at the procedures, careful consideration was given to the comments received on the proposed rulemaking of January 17, 1983, discussed above, and the comments received on the proposed rulemaking on Mineral Leasing Act right-of-way processing published in the **Federal Register** of June 25, 1984 (49 FR 25972). Most of the comments made the point that existing cost recovery regulations did not take into account the costs incurred for the benefit of the general public. In response to this point, this proposed rulemaking establishes specific criteria for establishing the costs that would be reimbursed to the United States for processing of a right-of-way grant or temporary use permit application to reflect the public benefit and public service factors, among others, under the Federal Land Policy and Management Act.

As part of the development process for this proposed rulemaking, careful consideration was given to the reasonableness factors in section 304(b) of the Federal Land Policy and Management Act in an attempt to define the best method of estimating the reasonable amounts an applicant or holder should reimburse the United States in connection with processing an application for a right-of-way grant or temporary use permit.

Consideration and Definition of Reasonable Recovery Factors

Actual Costs

Under the Federal Land Policy and Management Act, it is reasonable to begin the calculation of a fee with actual costs as the benchmark. The courts have recognized that it is not unconstitutional for an agency to charge the actual costs of application processing, including the costs of an environmental impact statement (see, e.g., *Mississippi Power and Light Co.* v. *Nuclear Regulatory Comm.*, 601 F. 2d 223 (5th Cir. 1979).

The term "actual costs" as it is used in this proposed rulemaking represent the financial measure or resources expended on processing an application for a right-of-way or in monitoring the construction, operation and termination of a facility authorized by a grant or permit. Cost information is based on Federal agency accounting and reporting systems which conform to the accounting principles and standards prescribed by the Comptroller General of the United States. The elements of costs associated with right-of-way grant or temporary use permit applications are classified as "direct" or "indirect" costs.

Direct costs include agency expenditure for labor, material, stores and equipment usage identified with the performance of right-of-way responsibilities. Direct costs include, but are not limited to, gross wages and fringe benefits of Federal employees, material, stores, equipment and contract costs.

Indirect costs are allocated to specific project and reimbursement on a pro-rata basis. The Bureau of Land Management's accounting system identifies both direct and indirect costs. Thus, a ratio between direct and indirect costs can be determined. An indirect cost rate is determined annually and applied to direct costs to determine the amount charged for indirect costs.

This method of calculating costs is a generally acceptable practice in both the private and public sectors. Clients are normally billed for direct costs, plus a percentage of direct costs are added to compensate for indirect costs.

Certain governmental functions are excluded from actual costs in this proposed rulemaking. These functions involve costs which are essential for the functioning of the government, and would be incurred in the absence of any particular cost recoverable activities. The excluded costs include management overhead costs which are the salaries and other costs associated with the Bureau directorate, including all State Directors. Section 304(b) of the Federal Land Policy and Management Act requires that management overhead be excluded from chargeable costs. Additionally, costs related to the entire headquarters' staff are excluded except where an individual of that staff is required to perform work in the field on a specific case.

Actual costs do not include costs of studies or other work which the Department of the Interior is required to perform regardless of receipt of an application(s) for a right-of-way grant or temporary use permit. For example, an applicant will not be charged for the costs of land use planning triggered by his/her application because the Bureau of Land Management is required by statute to carry out land use planning regardless of the existence of an application. The legislative history of the Federal Land Policy and Management Act supports this approach (See *Nevada Power*, 711 F. 2d at 923).

Monetary Value of the Rights or Privileges Sought

In trying to determine the meaning of the term "monetary value" found in section 304(b) of the Federal Land Policy and Management Act, a number of different issues were considered. Moreover, it was not determined necessary to calculate a precise figure for monetary value. The equitable considerations presented by this factor are more qualitative than quantative. Besides, the monetary value of a right-of-way grant generally bears little relation to the cost of processing the application. Much of the processing cost is likely to be based on the environmental considerations rather than value of the lands traversed. Consequently, as noted in the legislative history of the Federal Land Policy and Management Act, it is possible for a right-of-way with a low monetary value to trigger a host of environmental studies that make the right-of-way prohibitively expensive. In an effort to apply some objective standard and to meet these equitable concerns, we have identified several approaches that serve as indicators of monetary value.

The proposed rulemaking would define monetary value as the objective value of the right-of-way grant. This could be stated as the financial worth of the entire project to the applicant. This could be estimated by identifying the difference in cost, in current dollars, between the proposed and the next least costly alternative open to the applicant to accomplish the same purpose or end as the proposed right-of-way. Alternatives could be either the same facility but located on non-Federal lands or an entirely different project or method of achieving the same result.

Another possibility would be to estimate monetary value by computing the residual return or residual profit of the project. Residual profit means the profit that remains after all costs, depreciation and fair return on invested capital are subtracted from gross return. In practice, this residual profit is very difficult to calculate. Assumptions regarding what is fair return to capital must be made. There are questions of whether there is residual profit when utilities are involved and whether the right-of-way should reflect the entire dollar amount of the residual profit.

Another approach that could be used is to determine whether the level of cost reimbursement could make acquisition of the right-of-way prohibitively expensive. In other words, would the costs so burden the applicant that the project could not go forward. This reflects the reservations expressed in the legislative history of the Federal Land Policy and Management Act that an applicant for a minor right-of-way grant should not be burdened with huge environmental costs and those costs should not put an applicant out of business. If processing costs would be prohibitively expensive to a particular applicant, the State Director could consider reducing the level of cost reimbursement under section 2808.5(b) of the proposed rulemaking to allow the processing and issuance of the right-of-way application.

Fair market value was also considered as part of the effort to define monetary value, but was not used. Congress did not intend the use of the fair market value concept in this situation. First, Congress specifically says fair market value when it means it (See section 504(g) of the Federal Land Policy and Management Act (43 U.S.C. 1764(g)(1982)) concerning fair market value for rental of rights-of-way under title V of that Act). It did not use the term in section 304(b) of the Act.

Public Benefits

In trying to reach a reasonable decision on a definition of the term "public benefits," the Department of the Interior was guided by the decision of the Tenth Circuit Court of Appeals in two cases, *Alumet* v. *Andrus*, 607 F. 2d 911 (10th Cir. 1979) (*Alumet*) and *Nevada Power, supra*. In *Alumet*, the Court rejected the argument that all environmental impact statement costs are *per se* a public benefit and consequently may not be charged to an applicant. In *Nevada Power*, the Tenth Circuit rejected the opposite notion that under section 304(b) of the Federal Land Policy and Management Act all environmental impact statement costs are a private benefit *per se*. This leads to the conclusion that the Court would be uncomfortable with any test which automatically allocates costs between public and private benefits, such as a 50/50 or 25/75 ratio, for example.

In *Nevada Power*, the Tenth Circuit found that while the Secretary of the Interior is not precluded from charging an applicant the full costs of an environmental impact statement, the Federal Land Policy and Management Act requires the Secretary to consider that portion of the costs which are incurred for the benefit of the general public, rather than for an applicant, in determining reasonable costs. One could spend considerable time discussing the "metaphysical" question of whether a particular portion of an environmental impact statement benefits the applicant or the general public.

There are other issues which cloud the question of public benefits that need to be considered. For example, consideration of environmental issues and alternatives in an environmental impact statement may be considered by industry to be of public benefit. But the process of completing an environmental impact statement often provides substantial benefits to the applicant. Public comment on environmental issues often helps to diffuse political opposition to a project. An environmental impact statement may uncover an environmentally acceptable alternative which may allow an otherwise unacceptable project to be built. Special studies of seismic and climatic conditions sometimes reveal that the applicant's original proposal would not meet necessary engineering standards or is otherwise flawed. When an accident is prevented or money saved because higher standards are used, an applicant benefits because the

movement of its commodity is not interrupted. These types of benefits are difficult to measure and may not be apparent until after a project has been completed and has operated for many years. Such future measurements are meaningless to the Bureau of Land Management which uses the revolving fund established by section 304(b) of the Federal Land Policy and Management Act to finance current processing of applications for such projects.

The approach used in the proposed rulemaking recognizes two levels of public benefit. First, public benefit includes the costs of studies for information which the Bureau of Land Management is required, by statute or regulation, to collect regardless of the application (e.g., land use planning, wilderness study) and thus cannot be charged to the applicant (See *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974)). As a matter of standard agency practice, such information is not included in the Bureau's billing for actual costs. Thus, no additional reduction is necessary.

Second, public benefit includes the costs of studies and data collection undertaken solely for application processing but that may have some value to the Bureau of Land Management separate and apart from processing the application. For example, a wildlife, cultural resources or other study that is considered useful as baseline data to retain for assessing future applications would fall into the public benefit category. Accordingly, it is recognized that work undertaken on an application would be for the benefit of the general public whenever it is determined that a study will be of use to the Bureau in another context. If, however, the data generated by an applicant's project was or is expected to be useful only for processing the application or monitoring the grant, it will not be given credit for public benefit.

Costs incurred for the benefit of the general public are, therefore, defined in the proposed rulemaking as funds expended by the United States in connection with the processing of an application that provide value or utility to the United States or the general public apart from application processing. Section 2808.5 of this proposed rulemaking would provide authority for the authorized officer to consider public benefits on a case-by-case basis and, where determined appropriate, to waive or reduce costs required to be reimbursed.

Public Services

To distinguish the factor of public services from public benefit, the proposed rulemaking would develop a definition which recognizes the services which the applicant may provide as a result of the right-of-way that can be considered quasi-governmental or as serving a public program. Both the House and Senate reports on the bills that became the Federal Land Policy and Management Act contained language describing what the Secretary of the Interior should take into consideration when establishing fees. The Senate report says the Secretary should consider "the extent to which applicants" proposals and the *Federal program* to which the applications relate . . . are mutually beneficial to the Federal government and provide significant public benefits." (S. Rep. No. 583, 94th Cong., 1st Sess. 55–56 (1975) (emphasis added)). The House Report says "that the Secretary should consider the benefits to *public programs* in determining whether collection of specific costs is appropriate. . ." (H.R. Rep. No. 1163, 94th Cong., 2d Sess. 15 (1976) (emphasis added)). The outright exemptions from the cost recovery provisions of the regulations contained in section 2808.1(b) and discretionary exemptions under section 2808.5 of the proposed rulemaking are provided to comport with the intent of Congress. While the foregoing quotes speak of public benefits, they were made before the conference committee on the Federal Land Policy and Management Act introduced the term "public service." Nonetheless, the quotes express elements of public service as they have been organized in the proposed rulemaking's consideration of the factors.

In addition, the term "public service provided" would be defined in the proposed rulemaking as tangible improvements, such as roads, trails, recreation facilities, etc., of positive public value expected in connection with the construction and operation of the project for which a right-of-way grant is sought.

For example, a hydroelectric or water supply project may provide a water-based recreational facility on the public lands that was previously unavailable. Construction and maintenance of ancillary roads or the right-or-way itself may also provide desirable access to public lands. Where such additional uses are beneficial, a reduction for this factor may be considered. The relative merits of such service benefits can be expressed in "user days" which not only provide an easy method to set a value on the service (value of a user day), but would also provide a method to quantify the amount of benefits from public service.

Generally, public service does not exist where the consumer pays for the full cost of the service provided. Some right-or-way holders, primarily utilities, raise the argument that they provide a public service even though the customer pays for such service. The reasoning is that the charge which can be made is held artificially low through ratemaking by governmental agencies. Proper ratemaking, however, takes into account all appropriate utility costs. Ratemaking and right-of-way application processing are two distinct processes; to permit such cross compensation would undermine the integrity of each process.

Accordingly, the public service factor, as it is applied in the proposed rulemaking, would permit the Bureau of Land Management to exempt from cost reimbursement governmentally sponsored projects funded through general tax revenues.

Section 2808.5 of the proposed rulemaking would provide flexibility for unique, tangible public service benefits to be considered on a case-by-case basis and would allow for a reduction or waiver of reimbursable costs where the authorized officer determines that they exist.

Efficiency to Government Processing

The term "efficiency to government processing" would be defined in the proposed rulemaking as the ability of the government to process an application with a minimum of waste, expense and effort. Such a determination requires the consideration of cost recovery from the point of view of the Federal Budget, including the ability of the Bureau of Land Management under the budget process to respond to applications in a timely and efficient manner. Two separate considerations are required.

The first consideration relates to the establishment of a cost recovery process that does not cost more to operate than would be collected or would not unduly increase the costs to be recovered. Estimates made by the Bureau of Land Management based on experience indicate that the cost of maintaining actual cost data on a specific case is prohibitive where the amount potentially collectable is small. This is caused principally by the need to extensively reorder the Bureau's automated cost accounting system to add a relatively few items of information. Such changes affect more

than just the right-of-way portion of the cost accounting system.

The Bureau of Land Management's studies and estimates of the cost to process certain groups of applications supports the Bureau's use in the past of an actual cost cutoff separating the non-major cases for which specific costs data are not kept from major cases where such data are kept.

These general criteria have been incorporated into this proposed rulemaking. For major cases that require the gathering of original data to comply with the National Environmental Policy Act of other statutes, or when an interdisciplinary team must be formed to evaluate the data and/or an environmental impact statement is required, actual cost data will be kept. For cases falling in the non-major actual cost category, on the other hand, cost reimbursement is established through average costs of a group(s) of similar projects.

The second consideration relates to the Bureau of Land Management's ability to react efficiently to an application and process the application in a timely manner. The Federal Budget process cannot be adjusted quickly to changes in workload. Also, an agency cannot ordinarily request and obtain a standing appropriation based on conjectural situations. Such situations are those in which appropriations are requested simply to be available if needed and thus avoid delays in governmental operations, with fire suppression and other "emergency" measures being the best examples of this situation.

Individual cases at the low end of actual costs have less impact on the efficiency of governmental processing than those at the high end. Small funding shifts of appropriated funds can generally be made without a major effect on other Bureau operations; large shifts cannot be accommodated within the resources of the agency. Without appropriate cost reimbursement, there could be delays ranging from six months to more than two years in processing a case while appropriations are requested and obtained. The legislative record for appropriations for the Trans-Alaska Pipeline System provides a good example of this problem.

Under the proposed rulemaking, more than 90 percent of the right-of-way applications will fall under the categories requiring a fixed cost reimbursement fee. The variations between the fixed fees, based on average costs, and the Bureau of Land Management's actual costs will be minor and will not affect efficiency. The few large cases initiated each year (10 to 20 per year over the last four years) will require individual analysis. For these latter cases, it is expected that the work can be efficiently handled except where the applicant requests expedited, non-standard handling.

If the Bureau of Land Management were to honor every request for expedited handling, it would have to provide special or additional staffing. As a result, actual costs might exceed the amount that would be reasonable under this factor. The proposed rulemaking would provide that in those instances where an applicant makes a request for expedited processing, no work requiring the use of funds of the United States could be performed until adequate funding is provided through the appropriations process or otherwise made available.

Additionally, in the proposed rulemaking there is a provision that permits the applicant to choose to do all or part of any special study or analysis to standards established by the authorized officer. An applicant also may choose to waive consideration of reasonable costs and agree to pay all actual costs. These provisions would allow flexibility for an applicant to choose to go ahead with a project requiring expedited handling where funds are not otherwise available for the immediate completion of such work by the Bureau of Land Management.

Other Factors

The Federal Land Policy and Management Act provides that the Bureau of Land Management consider "other factors relevant to determining the reasonableness of the cost." In this proposed rulemaking, the State Director would have flexibility to take into account a wide range of special circumstances, including unique instances of public benefits or public services, not mentioned in preceding paragraphs, on a case-by-case basis. Where determined appropriate, the State Director may waive or reduce the costs required to be reimbursed. Other factor considerations are set forth in § 2808.5 of this proposed rulemaking.

Proposed Method To Apply the Reasonable Cost Recovery Factors in Major Cases

Because of the difficulty for both the United States and applicants to develop, analyze and compare data under any of the above discussed factors and alternatives, a simple method has been chosen for this proposed rulemaking. In trying to establish a reasonable approach to the reimbursement of cost, the Tenth Circuit Court of Appeals recognized the inherent difficulty that the Secretary of the Interior faces in applying the factors set out in section 304(b) of the Federal Land Policy and Management Act by describing the process as "unscrambling eggs"and "metaphysical." Beyond the issue of definitions, is one of interrelating the factors in such a manner that sense is made of seemingly conflicting aspects.

The Court noted that the Secretary of the Interior has considerable discretion to consider the factors and make a reasonable determination of how best to apply the 304(b) factors. The proposed rulemaking uses the factors in terms of the estimated costs of constructing the proposed facilities on public lands for which a right-of-way grant or temporary use permit is sought. The estimate of the costs to construct the proposed facilities on public lands would be provided by the applicant and reviewed and approved by the authorized officer. The Department of the Interior has made the judgment that where the actual costs of processing the application are one percent or less of the costs of construction of the proposed facilities on public lands, the Bureau of Land Management should collect full actual costs.

This approach also is reasonable from the standpoint that having to pay actual costs up to the one percent of construction costs ceiling is not so onerous as to put an applicant out of business. A need to balance such equities was recognized by Senator McClure in his colloquy with Senator Haskell in the Senate—House Conference on the Federal Land Policy and Management Act (See Conference Report on S. 507 "Resources Lands Management," United States Senate, unpublished Meeting and Markup Transcript at 29 (Sept. 15, 1976), reprinted in 18 Department of Interior, Legislative History of the Federal Land Policy and Management Act of 1976).

Additionally, a precedent has been established by a similar ceiling approach now used by the State of New York. Under State law, corporations are required to pay a fee based on the actual costs to the State to prepare an environmental impact statement and related activities. The New York law provides, however, that in no case shall it exceed one-half of one percent of the total cost of a non-residential project; for residential projects, it shall not exceed two percent.

Added benefits to use of such an approach are that it is efficient for both the applicant and the United States from the standpoint of ease of use, it avoids complex data collection and calculations and can readily be

determined in advance of the filing of an application. It may also tend to make the United States increase its efficiency in order to stay under the one percent of actual costs level in the studies that it performs. Use of the estimated costs of construction on public lands gives a readily available dollar value which, when considered in relation to the actual costs factor, can be used to establish a reasonable level of actual cost reimbursement.

In making its comments on this proposed rulemaking, the public is specifically requested to review the reasonableness factors and suggest methods of applying those factors to the reimbursement of costs requirement, including a discussion of what percentage of reduction should be applied in the instances where those factors are significant. Recommendations for the amount of reduction have ranged from 10 to 100 percent. The comments should provide a detailed explanation for the recommended percentage of reduction and should be specific and supported by a proposed methodology, as well as appropriate data.

Cost Recovery Exemptions

Generally, under the consideration of the public service provided, Federal agencies and State and local governments or agencies or instrumentalities thereof should be exempt from the cost reimbursement provisions. This exemption would not apply in those instances where a principal source of the entities' revenues is derived from charges levied on customers for services rendered that are similar to services rendered by a profitmaking business entity. It is reasonable to exempt these entities as they provide a valuable public service at no charge and are supported by public funding. The proposed rulemaking would provide for such exemptions and also would provide for exemptions where a road use agreement or reciprocal road agreement is involved.

The Proposed System

The cost reimbursement procedures for non-major cases, categories I through IV, where the data necessary to comply with the National Environmental Policy Act or other statutes are available in the office of the authorized officer and no environmental impact statement or interdisciplinary team analysis of data is required, have been separated from the major cases. Major cases require the collection of new data and/or the preparation of an environmental impact statement. The separation is accomplished by use of a series of work descriptions and a processing fee schedule as follows:

(1) *Category I.* An application for right-of-way grant or temporary use permit authorizing the use of the public lands for which the data necessary to comply with the National Environmental Policy Act or other statutes are available in the office of the authorized officer or is furnished by the applicant; and no field examination of the lands affected by the application is required.

(2) *Category II.* An application for a right-of-way grant or temporary use permit authorizing the use of the public lands for which the data necessary to comply with the National Environmental Policy Act or other statutes are available in the office of the authorized office or is furnished by the applicant; and one field examination of the lands affected by the appliction to verify the existing data is required.

(3) *Category III.* An application for a right-of-way grant or temporary use permit authorizing the use of the public lands for which the data necessary to comply with the National Environmental Policy Act or other statutes are available in the office of the authorized officer or is furnished by the applicant; and two field examinations of the lands affected by the application are required.

(4) Category IV. An application for a right-of-way grant or temporary use permit authorizing the use of the public lands for which some original data are required to be gathered to comply with the National Environmental Policy Act or other statutes; and two or three field examinations of the lands affected by the application are required.

(5) Category V. An application for a right-of-way grant or temporary use permit authorizing the use of the public lands for the gathering of original data is required to comply with the National Environmental Policy Act or other statutes may be required; or three or more field examinations of the lands affected by the application are required.

Category	Fee
I	$125
II	300
III	550
IV	925
V	(1)

[1] As required.

Non-Major Cases

In developing categories I through IV, a team of Bureau of Land Management personnel knowledgeable in processing right-of-way cases reviewed some 160 actual cases. The same case information was provided by Bureau field offices detailing the type of work performed and the estimated cost of doing the specific tasks involved. This review showed that processing costs had little relationship to the length or size of the right-of-way sought. Cost increments were shown to be related to: (1) the amount of information necessary to meet the requirements of the National Environmental Policy Act; (2) whether this information was available in Bureau files or needed to be collected on the ground; (3) the number of necessary field examinations of the proposed and alternative areas to be utilized by the right-of-way project; and (4) the type of appraisal required to estimate the annual rental to be charged for the right-of-way. Additionally, Bureau field offices have, since November 12, 1982, kept and reported actual time and cost on some 500 right-of-way projects falling in the four categories used in this proposed rulemaking for non-major cases. These data were listed and analyzed with automatic data processing equipment. These analyses affirmed the category definitions used in this proposed rulemaking and provided data for the foregoing proposed fee schedule. Analysis of the study data indicated that applicants would benefit from having a fixed table of costs since, in most cases, the expense of calculating and maintaining actual cost records would cost more than the fixed fee schedule charges.

Categories I through IV generally involve the processing of applications where the data necessary for processing the application has already been collected as part of the Bureau of Land Management's planning system, other application processing or as part of a Federal or other resource study. Little or no additional information is required. It is the nature of these projects that they are of local benefit and are not of regional or national significance. The Bureau generally has found that because they are small, local in impact and require no environmental impact statement, there is little opportunity for public benefits or public services associated with these projects.

It should be noted that Category I through IV cost reimbursement charges do not include the cost of appraisals to determine fair market value rental because this cost serves a public benefit, i.e., the determination of rental based on the fair market value of the use of the involved lands, thus assuring a proper return to the taxpayer.

Where an application is determined to be in Categories I through IV under the proposed rulemaking, the cost reimbursement required is listed in the fee schedule. However, where an

applicant believes that a specific application provides independent value or utility which benefits the general public or provides significant public services, an applicant may seek a reduction or waiver of such payment under section 2808.5 of the proposed rulemaking.

Major Cases

Where the authorized officer determines an application to be a major case (Category V), the proposed rulemaking provides that, in those instances, when the actual costs of processing the application are one percent or less of the costs of constructing the proposed facilities on public lands, the applicant would pay all actual costs of processing. Where the actual costs are greater than one percent of the cost of construction of the facility on the public lands segment, the United States shall pay for that portion of the actual costs that exceed the one percent of construction costs.

After determining that an application is a major case, the authorized officer would be required to:

1. Prepare a preliminary scoping of the processing issues involved, identifying any potential conflicts with resource values or other projects;

2. Develop a preliminary work plan, setting out specific needs, such as the degree of environmental study needed and a rational timeframe for completing the work;

3. Complete a preliminary financial plan, estimating the actual costs to be incurred by the United States in the processing of the application and monitoring the grant or permit; and

4. Obtain a construction cost estimate from the applicant which identifies that portion of total costs that are involved in constructing the proposed facility on public lands.

The authorized officer would be required to discuss the preliminary data, including cost estimates, with the applicant. Where possible, differences in scope, timing and the like would be worked out with the applicant. The applicant might also choose to do all, or any part, of the environmental assessment or other studies, subject to the approval of the appropriate official of the Bureau of Land Management or to pay all of the estimated actual costs of the work identified in the work plan. These options may be of benefit in meeting an applicant's project schedule and/or in reducing overall costs.

Following the discussions with the applicant, the authorized officer would be required to prepare a final determination of the preliminary scoping, work plan and cost plan estimating the actual costs to be incurred by the United States, identifying the portion of actual costs to be paid by the applicant, and where appropriate, the portion to be paid by the United States. Where an applicant believes that a specific Category V application provides independent value or utility which benefits the general public or provides significant public services, or the payment of its portion of costs is prohibitive, an applicant may seek a reduction or waiver of cost reimbursement under section 2808.5 of the proposed rulemaking.

Monitoring Costs

In a process similar to that used for determining application cost reimbursement, the following fee schedule for monitoring right-of-way grants or temporary use permits by category was developed:

Category	Fee
I	$50
II	75
III	100
IV	200
V	(1)

[1] Shall be included with cost determined under application processing.

The monitoring fees for Categories I through IV also were derived after the analysis of actual cost information provided by various Bureau of Land Management field offices. Analysis of the monitoring data indicated that the average right-of-way grant or temporary use permit in Categories I through IV require one field examination. The data indicates that an average field examination costs $200. The estimated number of right-of-way grants or temporary use permits by category that can normally be examined in a single day (i.e., one field trip) are: (1) Category I, four grants; (2) Category II, three grants; (3) Category III, two grants; and (4) Category IV, one and one-half grants. Dividing the $200 average filed examination costs by the number of grants per category that can be monitored per day gives the cost of monitoring one grant by category.

The monitoring fee for major grants is established at the same time as the application processing fee is established. The one percent of construction costs will apply to both processing and monitoring costs. Since monitoring creates neither new studies providing public benefits nor additional public services from the right-of-way, no further reduction from actual costs for these factors is likely.

The principal author of this proposed rulemaking is Darrell Barnes, Division of Rights-of-Way, Bureau of Land Management, assisted by the staff of the Division of Legislation and Regulatory Management, Bureau of Land Management.

It is hereby determined that this rulemaking does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) is required.

The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 and will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

The changes made by this proposed rulemaking will not substantially increase the payments made by right-of-way applicants for the processing and monitoring of their applications/grants. The changes made by the proposed rulemaking will make the procedures for reimbursement of costs fairer for users and will recover for the United States a greater portion of the costs incurred in handling right-of-way applications. The impact of the proposed rulemaking will be the same, regardless of the size of the entity applying for a right-of-way grant.

The information collection requirements contained in this proposed rulemaking have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned clearance number 1004–0157.

List of Subjects in 43 CFR Part 2800

Administrative practice and procedure, Communications, Electric power, Highways and roads, Pipelines, Public lands—rights-of-way.

Under the authority of title V of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1761–1771), it is proposed to amend Part 2800, Group 2800, Subchapter B, Chapter II of Title 43 of the Code of Federal Regulations as set forth below:

PART 2800—[AMENDED]

1. The authority citation for part 2800 continues to read:

Authority: 43 U.S.C. 1761–1771.

2. Section 2800.0–5 is amended by adding new paragraphs (o) through (s) to read:

§ 2800.0–5 Definitions.

* * * * *

(o) "Actual costs" means the financial measure of resources expended or used by the Bureau of Land Management in processing a right-of-way application or

monitoring the construction, operation and termination of a facility authorized by a grant or permit. "Actual costs" includes both direct and indirect costs, exclusive of management overhead.

(p) "Monetary value of the rights and privileges sought" means the objective value of the right-of-way or permit.

(q) "Public benefit" means funds expended by the United States or an applicant in connection with the processing of an application for studies and data collection that have value or utility to the Untied States or the general public separate and apart from application processing.

(r) "Public service provided" means tangible improvements, such as roads, trails, recreation facilities, etc., with significant public value that are expected in connection with the construction and operation of the project for which a right-of-way grant is sought.

(s) "Efficiency to the Government processing" means the ability of the United States to process an application with a minimum of waste, expense and effort.

§ 2802.1 [Amended]

3. Section 2802.1(c) is amended by removing from where it appears the citation "§ 2803.1–1" and replacing it with the citation "subpart 2808".

§ 2802.4 [Amended]

4. Section 2802.4(a) is amended by removing from where it appears the citation "§ 2803.1–1" and replacing it with the citation "subpart 2808".

§ 2802.5 [Amended]

5. Section 2802.5(a)(1) is amended by removing from where it appears the citation "§ 2803.1–1" and replacing it with the citation "subpart 2808".

§ 2803.1–1 [Removed]

6. Section 2803.1–1 is removed in its entirety.

§ 2803.6–5 [Amended]

7. Section 2803.6–5(d) is amended by removing from where it appears the citation "§ 2803.1–1" and replacing it with the citation "subpart 2808".

8. A new Subpart 2808 is added to read:

Subpart 2808—Reimbursement of Costs

Sec.

Subpart 2808—Reimbursement of Costs

§ 2808.1 General.

(a) An applicant for a right-of-way grant or temporary use permit under this part shall reimburse the United States in advance for the expected reasonable administrative and other costs incurred by the United States in processing the application, including the preparation of any reports or statements pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), prior to the United States having incurred such costs.

(b) The regulations in this subpart do not apply to the following:

(1) Federal agencies;

(2) State and local governments or agencies or instrumentalities thereof when a right-of-way grant or temporary use permit is granted for governmental purposes benefiting the general public, however, if the principal source of revenue results from charges being levied on customers for services similar to those rendered by a profitmaking corporation or business, they shall not be exempt; or

(3) Cost share roads or reciprocal right-of-way agreements.

§ 2808.2 Cost recovery categories.

§ 2808.2–1 Application categories.

(a) The following categories shall be used to establish the appropriate nonrefundable fee for each application pursuant to the fee schedule in § 2808.3–1 of this title:

(1) *Category I.* An application for a right-of-way grant or temporary use permit to authorize a use of public lands for which the data necessary to comply with the National Environmental Policy Act and other statutes are available in the office of the authorized officer or from data furnished by the applicant; and no field examination is required.

(2) *Category II.* An application for a right-of-way grant or temporary use permit to authorize a use of public lands for which the data necessary to comply with the National Environmental Policy Act and other statutes are available in the office of the authorized officer or from data furnished by the applicant; and 1 field examination to verify existing data is required.

(3) *Category III.* An application for a right-of-way grant or temporary use permit to authorize a use of public lands for which the data necessary to comply with the National Environmental Policy Act and other statutes are available in the office of the authorized officer or from data furnished by the applicant; and 2 field examination to verify existing data are required.

(4) *Category IV.* An application for a right-of-way grant or temporary use permit to authorize a use of public lands for which some original data are required to be gathered to comply with the National Environmental Policy Act and other statutes; and 2 or 3 field examinations are required.

(5) *Category V.* An application for a right-of-way grant or temporary use permit to authorize a use of public lands for which the gathering of original data are required to comply with the National Environmental Policy Act and other statutes; and 3 or more field examinations are required.

§ 2808.2–2 Category determination.

(a) The authorized officer shall determine the appropriate category and collect the required application processing fee pursuant to §§ 2808.3–1 and 2808.5 of this title before processing an application. A record of the authorized officer's category determination shall be made and given to the applicant. This determination is a final decision for purposes of appeal under § 2804.1 of this title. Where an appeal is filed, actions pending decision on appeal shall be in accordance with § 2808.6 of this title.

(b) During the processing of an application, the authorized officer may change a category determination to place an application in Category V at any time it is determined that the application requires the preparation of an environmental impact statement. A record of change in category determination under this paragraph shall be made and furnished to the applicant. The revised determination is appealable in the same manner as an original category determination under paragraph (a) of this section.

§ 2808.3 Fees and payments.

§ 2808.3–1 Application fees.

(a) The fee by category for processing an application for a right-of-way or temporary use permit is:

Category	Fee
I	$125
II	300
III	550
IV	925
V	[1]

[1] As required.

(b) Where the amount submitted by the applicant under paragraph (a) of this section exceeds the amount of the required fee determined by the authorized officer, the excess shall be refunded. If requested in writing by the applicant, the authorized officer may apply all or part of any such refund to the grant monitoring fee required under § 2808.4 of this title or to the rental payment required by § 2803.1–2 of this title.

(c) Upon a determination that an application falls under Category V, the authorized officer shall:

(1) Complete a preliminary scoping of the issues involved;

(2) Prepare a preliminary work plan;

(3) Develop a preliminary financial plan, estimating the actual costs to be incurred by the United States in the processing of the application; and

(4) Require the applicant to submit a construction cost estimate for the project which identifies the portion of those costs which will be used to construct the proposed facilities on the public lands for which a right-of-way grant or temporary use permit is desired.

(d) The authorized officer shall discuss the preliminary plans and data and verify the construction cost estimate submitted and developed under paragraph (c) of this section with the applicant.

(e) (1) The applicant is encouraged to do all or part of any special study or analysis required in connection with the processing of the application to standards established by the authorized officer. After coordination with the applicant as required by paragraph (d) of this section, the authorized officer shall develop final scoping, work and financial plans which reflect any work the applicant agrees to do and determine the amount of actual costs to be reimbursed by the applicant.

(2) An applicant may choose to waive consideration of reasonable costs under paragraph (e)(1) of this section and agree to pay all actual costs incurred by the United States in processing the application and monitoring the grant or temporary use permit. The waiver shall be in writing and shall be filed with the authorized officer.

(f) Where a request for a waiver has been filed under paragraph (e)(2) of this section or where the estimated actual costs of processing the application, as determined under paragraph (e) of this section, are determined to be 1 percent or less of the estimated cost of constructing the proposed facilities on public lands, the applicant shall reimburse the United States for all actual costs of processing the application before the grant or permit shall issue.

(g) (1) Where the estimated actual costs of processing the application, as determined under paragraph (e) of this section, are determined to exceed 1 percent, the applicant shall not be responsible for any actual costs exceeding 1 percent of the estimated costs of construction on public lands unless said applicant agrees in writing to assume all actual costs.

(2) Where the costs of processing an application are determined to exceed 1 percent or where a State Director has granted a waiver or reduction in such costs, the necessary funding shall be provided either through the Bureau's appropriation process or otherwise made available for the processing of the application or such processing shall not proceed.

(h) The authorized officer shall provide the applicant with a written determination of the reasonable costs to be reimbursed by the applicant or holder and those that will be funded by the United States under paragraphs (e) through (g) of this section and § 2808.5 of this title. This determination is a final decision for purposes of appeal under § 2804.1 of this title. Where an appeal is filed, actions pending decision on appeal shall be in accordance with § 2808.6 of this title.

§ 2808.3–2 Periodic advance payments.

(a) The authorized officer may periodically estimate the reasonable costs expected to be incurred by the United States for specific work periods in processing the application under the provisions of §§ 2808.3–1 (e) through (g) of this title and shall inform the applicant of the estimated amount to be reimbursed for the period and the applicant shall make payment of such estimated reimbursable costs within the time specified in the notice of the amount to be reimbursed.

(b) If the payments required by paragraph (a) of this section exceed the actual costs incurred by the United States, the authorized officer shall adjust the next billing to reflect the overpayment, or make a refund from applicable funds under the authority of 43 U.S.C. 1734. An applicant shall not set off or otherwise deduct any debt due it or any sum claimed to be owed it by the United States without the prior written approval of the authorized officer.

(c) The authorized officer may re-estimate the actual costs determined under §§ 2808.3–1 (e) through (g) of this title at any time it is determined that a change warranting a re-estimate occurs. An appeal of a re-estimate shall be treated in the same manner as an original estimate made under § 2808.3–1(e) of this title.

(d) Before issuance of a right-of-way grant or temporary use permit, an applicant shall pay such additional amounts as are necessary to reimburse the United States in full for any costs incurred, but not yet paid under § 2808.3–1(h) of this title.

§ 2808.3–3 Costs incurred for a withdrawn or denied application.

(a) An applicant whose application is denied is liable for any costs incurred by the United States in processing the application. Those amounts that have not been paid are due within 30 days of the receipt of a bill from the authorized officer identifying the amount due.

(b) An applicant who withdraws an application before a grant or temporary use permit is issued is liable for all costs incurred by the United States in processing the application up to the date the authorized officer receives the written notice of withdrawal, and for costs subsequently incurred in terminating the processing of said application. Those amounts that have not been paid are due within 30 days of receipt of a bill from the authorized officer identifying the amount due.

§ 2808.3–4 Joint liability for payments.

(a) When 2 or more applications for a right-of-way grant are filed which the authorized officer determines to be in competition with each other, each applicant shall reimburse the United States as required by § 2808.3 of this title, subject however, to the provisions of § 2808.1(b) of this title. Each applicant shall be responsible for the reimbursement of the reasonable costs identified with his/her application. Costs that are not readily identifiable with either of the applications, such as costs for portions of an environmental impact statement that relate to all of the applications, generally, shall be paid by each applicant in equal shares or such other proportion as may be agreed to in writing by the applicants and the authorized officer prior to the United States incurring such costs.

(b) When, through partnership, joint venture or other business arrangement, more than 1 person, partnership, corporation, association or other entity apply together for a right-of-way grant or temporary use permit, each such applicant shall be jointly and severally liable for costs under § 2808.3 of this title for the entire system, subject however, to the provision of § 2808.1(b) of this title.

§ 2808.4 Reimbursement of costs for monitoring.

(a) After issuance of a right-of-way grant or temporary use permit for which a fee was assessed under § 2808.3 of this title, the holder shall, prior to the United States incurring such costs, reimburse the United States for costs to be incurred by the United States in monitoring the construction, operation, maintenance and termination of authorized facilities on the right-of-way grant or temporary use permit area, and for protection and rehabilitation of the lands involved, under the following schedule:

(1) The fee, by category, as determined under § 2808.2–2 of this title, for monitoring a right-of-way grant or temporary use permit is as follows:

Category	Fee
I	$50
II	75
III	100
IV	200
V	[1]

[1] Shall be included with costs determined under § 2808.3.

(b) The holder shall submit the payment for the cost of monitoring along with the written acceptance of the terms and conditions of the grant or permit. The amount of the required payment shall be determined under the schedule in paragraph (a) of this section. Acceptance of the terms and conditions of the grant or permit shall not be effective unless the required payment is made.

§ 2808.5 Other cost considerations.

(a) The State Director, after consultation with an applicant or holder may reduce or waive cost reimbursement by § 2808.3 of this title. In reaching a decision, the State Director may require the applicant/holder to submit a written analysis of the case showing specific monetary value consideration, public benefits, public services or other data or information which support a proposed finding that an application, grant or temporary use permit qualifies for a reduction or waiver of cost reimbursement. Action on a Category V application shall be suspended pending the State Director's decision.

(b) The State Director may base the decision to reduce or waive reimbursable costs on any of the following factors:

(1) The applicant's/holder's financial condition is such that payment of the fee would result in undue financial hardship;

(2) The application processing or grant monitoring costs are determined to be grossly excessive in relation to the monetary value of the public lands directly affected by the right-of-way grant or the costs of constructing the facilities or project requiring the right-of-way;

(3) A major portion of the application processing or grant monitoring costs are the results of issues not related to the actual right-of-way or temporary use permit;

(4) The applicant/holder is a nonprofit organization, corporation or association which is not controlled by or a subsidiary of a profitmaking enterprise;

(5) The studies undertaken in connection with the processing of the application have a public benefit;

(6) The facility or project requiring the right-of-way grant will provide a special service to the public or to a program of the Secretary;

(7) A right-of-way grant is needed to construct a facility to prevent or mitigate damages to any lands or improvements or mitigate hazards or danger to public health and safety resulting from an Act of God, an act of war or negligence of the United States;

(8) The holder of a valid existing right-of-way grant is required to secure a new right-of-way grant in order to relocate facilities which are required to be moved because the lands are needed for a Federal or federally funded project, if such relocation is not funded by the United States;

(9) Relocation of a facility on a valid existing right-of-way grant requires a new or amended right-of-way grant in order to comply with the law, regulations or standards of public health and safety and environmental protection which were not in effect at the time the original right-of-way grant or temporary use permit was issued; or

(10) It is demonstrated that because of compelling public benefits or public services provided, or for other causes, collection of reimbursable costs by the United States for processing an application, for a grant or permit would be inconsistent with prudent and appropriate management of the public lands and the equitable interest of the applicant/holder or of the United States.

(d) The State Director may consider a reduction or waiver of fees under this section in determining reimbursable costs made under § 2808.3 of this title. Said determination is a final decision for purposes of appeal under § 2804.1 of this title. Where an appeal is filed, actions pending decision on appeal shall be in accordance with § 2808.6 of this title.

(e) Notwithstanding a finding by the State Director that there is a basis for reduction of the costs required to be reimbursed under this subpart, the State Director may not reduce such costs if funds to process the application(s) or to monitor the grant(s) or permit(s) are not otherwise available or may delay such decision pending the availability of funds.

§ 2808.6 Action pending decision on appeal.

(a) Where an appeal is filed on an application determined under § 2808.2–2(a) of this title to be in Category I through IV, an application shall not be accepted for processing without payment of the fee for such application according to the category determined by the authorized officer; however, when payment is made, the application may be processed and, if proper, the grant or temporary use permit issued. The authorized officer shall make any refund or other adjustment directed as a result of an appeal.

(b) Where an appeal is filed for an application determined under § 2808.2–2(a) of this title to be in Category V or for a related cost reimbursement determination under § 2808.3–1 (e) through (g) or § 2808.5(d) of this title, processing of the application shall be suspended pending the outcome of the appeal.

Dated: July 3, 1986

J. Steven Griles,

Assistant Secretary of the Interior.

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